United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2439

To be argued by
V. PAMELA DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2439

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTURO SANCHEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Arturo Sanchez appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on October 21, 1974, after a two day retrial before the Honorable Kevin T. Duffy, United States District Judge, and a jury.

Indictment 73 Cr. 48, filed on January 15, 1973, charged Arturo Sanchez, Andres Sanchez and Jose Salest Valverde in Count One with conspiracy to violate the federal narcotics laws in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Two charged Arturo Sanchez and Jose Salest Valverde with distributing and possessing with intent to distribute 97.45 grams of cocaine hydrochloride in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial as to Arturo and Andres Sanchez commenced on March 26, 1974.* The trial ended on March 29, 1974, when the jury found Andres Sanchez and Arturo Sanchez not guilty on Count One and were unable to reach a verdict on Count Two.

Appellant's second trial began on September 9, 1974, and ended on September 10, 1974, when the jury returned a guilty verdict on Count Two.

On October 21, 1974, Judge Duffy sentenced appellant to a one-year term of imprisonment to be followed by a term of three years special parole. Sanchez is free on bond pending this appeal.

Statement of Facts

1. The Trial

A. The Government's Case

Police Officer Charles Martinez, assigned to the New York Drug Enforcement Task Force, met Arturo Sanchez on February 24, 1972 when, acting as an undercover agent, he attended a party at the Macchu Picchu Restaurant at 1595 Third Avenue in Manhattan. A confidential informant introduced Officer Martinez to appellant, who was working as a waiter at the restaurant, and his father Andres Sanchez.

The next evening, February 25, 1972, Martinez returned to the Macchu Picchu and met with Arturo Sanchez who asked him what he wanted. Martinez replied that he wished to see Arturo's father, Andres. After an hour of waiting for the father, Officer Martinez was approached by Arturo Sanchez who pressed him concerning Martinez' business with

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* A severance was granted as to Valvede, who was a fugitive.

his father. When told that Martinez was there to purchase one-eighth kilogram of cocaine from his father, appellant pressed Martinez to buy from him instead. He said that the quality of his cocaine was as good as that of his father and the price the same (Tr. 12-17).*

Martinez left the restaurant, returning, after a meeting with surveillance officers, to agree to make the purchase from Arturo Sanchez. They arranged to meet at the Macchu Picchu at 3:00 P.M. the following day (Tr. 17-18).

Martinez returned to the Macchu Picchu Restaurant at 3:00 P.M. the next day, February 26, 1972, bringing with him $1,800. Since Arturo Sanchez was not there when he arrived, Martinez sat down to wait. Shortly thereafter, Valverde ("Salcita") entered the restaurant and asked Martinez why he wished to see Arturo. Martinez replied that he was there to purchase one-eighth kilogram of cocaine for $1,800 and that he did not want to wait any longer. Salcita told Martinez that he should wait and that he would get Arturo Sanchez (Tr. 19-20).

Salcita left and returned an hour later with Arturo Sanchez. Salcita told Martinez to go to the ladies room where Arturo was waiting. In the ladies room, Arturo Sanchez handed Martinez a package which the parties later stipulated contained 97.45 grams of cocaine hydrochloride and dilutents (Tr. 65-67).

Just outside the ladies room, Martinez placed the $1,800 in Sanchez' suit jacket. Martinez and Sanchez then discussed further transactions after which Officer Martinez left (Tr. 21-22). All of the conversations were conducted in Spanish which Martinez speaks (Tr. 13).

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* "Tr." refers to the transcript of the second trial on September 9-10, 1974; "App." refers to Appellant's Appendix; "Br." refers to Appellant's Brief.

Detective Vallely, another New York Drug Enforcement Task Force officer, testified about the surveillance he conducted of the meetings among Martinez, appellant and Salcita (Tr. 51-57).

B. The Defense Case

The defendant took the stand and corroborated Martinez' testimony up to the point of the sale itself. He claimed that he had agreed to sell Martinez' cocaine only to "get rid of him." (Tr. 73-75). However, he denied making the sale (Tr. 75).

2. The Pre-Trial Proceedings

Appellant was arrested on the charges in this case on January 4, 1973. The indictment was filed on January 15, 1973. On May 15, 1973 the Government filed a notice of readiness for trial. The District Court fixed August 1, 1973 as the date for trial.

On July 20, 1973, police officer Charles Martinez, the Government's principal witness, fell and struck his head in the course of his duties (H. 4-5).* He was taken to St. Vincent's Hospital in Manhattan, released and driven home by fellow officers (H. 6).

As a result of the accident, Martinez continually thereafter suffered from, among other things, intermittent spells of vertigo and nausea (H. 25, 33, 38) which were ultimately diagnosed as the product of a disturbance of the inner ear (H. 30-1). The problem was compounded by a second blow to the witness' head on September 13, 1973 (H. 15-16).

Between the date of the first accident, July 20, 1973 and January 22, 1974, the date that the Government represented

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* "H." refers to the transcript of the hearing on the motion to dismiss the indictment held on March 22, 1974.

that Martinez was available, the witness was examined by at least five doctors, including police surgeons, an eye doctor, a back doctor and a neurologist (H. 16, 18, 20, 26, 30).

At the direction of the police surgeon, Martinez remained away from duty from July 20 to August 7, 1973 (H. 8-11). He left his home only to visit a doctor or to take his wife, who did not drive, to the store (H. 11-12). These activities were undertaken only after the police surgeon granted permission to do so (H. 11-12).

The attacks of nausea and vertigo occurred two or three times a day during this period, but were unpredictable (H. Tr., pp. 33-4). Martinez explained at the hearing that the vertigo was always preceded by nausea so that, if he was driving at the time, he could pull over to the side of the road before the vertigo hit (H. 33).

On August 7, 1973 Martinez returned to work, but only for "light duty", *i.e.*, paper work (H. 12-13). Since the nausea and vertigo continued, he did not engage in undercover work (H. 38).

On July 30, 1973, the Government moved, pursuant to Rules 5(c)(i), 5(c)(ii) and 5(h) of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases ("Plan"), to adjourn the trial then scheduled for August 1st. The affidavit of the Assistant United States Attorney stated that Martinez had been examined by a physician who reported that it would be at least a month before the witness would testify (App., Ex. D).* An adjournment until

* The affidavit also stated that Government counsel would provide the District Court with updated information on the witness' condition as it was received (App., Ex. D). At the hearing on March 22, 1974, Government counsel offered to prove that the information concerning Martinez' health contained in the affidavit was obtained from New York City Police Headquarters (H. 40-41). A similar offer of proof was made with respect to the affidavit submitted in support of the second motion for an adjournment filed on October 10, 1973.

August 27, 1973 was sought and granted (App., Ex. D). Later the trial was rescheduled for October 15.

On September 13, 1973 Martinez, who was then still assigned to light duty, again accidently struck his head (H. 15-16). He was again taken off duty and not allowed to return to duty by the police surgeon until November 30, 1973. He reported for work, again on limited duty, on December 3, 1973 (H. 16-18, 28).

Accordingly, on October 10, 1973, the Government again moved for an adjournment of the trial. In her supporting affidavit, Government counsel stated that Martinez had been examined on October 5, 1973 by the police surgeon, who had reported that he was unfit to testify and would continue to be so for several weeks (App., Ex. E). Government counsel also represented that statements from the police surgeon upon which the Government relied would be supplied to the District Court upon request (App., Ex. E). The motion sought a four-week adjournment or, in the alternative, an adjournment pending the availability of the Court for the trial (App., Ex. E).

At a pre-trial conference held on October 12, 1973, Judge Duffy stated that the Sanchez trial could not go forward because of a trial in progress. On October 15 Judge Duffy granted the application for an adjournment, but did not fix a new trial date.

On December 3, 1973, Martinez returned to work for limited duty. He continued to experience nausea and vertigo. On December 18, 1973, while reporting for light duty, Martinez was referred by the police surgeon to a neurologist at Columbia Presbyterian Hospital for diagnosis and treatment of the vertigo (H. 30). The neurologist, Dr. Merritt, told the witness he had a disturbance of the inner ear (H. 30-31), for which he was given anti-vertigo pills and advised to get along with the symptoms as best he could until they disappeared.

On January 22, 1974, the Government represented that it was ready to go to trial the following day before Judge Bauman who apparently was then available to try the case (App., Ex. H., p. 2).

On February 22, 1974 defendant Andres Sanchez moved to dismiss the indictment on the ground that the Government had failed to comply with the Plan. Appellant filed a similar motion on February 28th. The defendants contended that there was no reasonable likelihood that Martinez would become available to testify within the meaning of Rule 5(c)(ii) and, alternatively, that if, in fact, he was then available, he also had been available during the preceding 6 to 8 months and that the earlier adjournments therefore had not been justified. Judge Duffy initially denied the motions without a hearing, but thereafter agreed to reconsider the matter at defense counsel's request. On March 22, 1974 the District Court held a hearing to determine whether or not Martinez had been available during the periods for which the Government had sought and received adjournments of the trial.

Martinez was the only witness who testified at the hearing. The defense did not offer any evidence to contradict the documentary medical evidence presented by the Government which established the medical findings concerning Martinez' vertigo and other symptoms resulting from his injuries.

On April 2, 1974 the District Court filed a memorandum opinion denying the motion to dismiss the indictment (App. Ex. H). The opinion carefully considered the defendants' arguments and found them to be without merit. Explaining the reasons for the denial of the motion, Judge Duffy wrote:

> "Here the Government's Notice of Readiness was filed within four months of the indictment, and the original scheduling of the trial on a date two and

a half months later was necessary to accommodate the crowded calendar of a newly appointed judge with a large caseload. Similarly, the period between December 3, 1973 and March 21, 1974 was taken up by two previously scheduled trials. Under the circumstances, the four month period of adjournment from August to Decembe · 1973, caused by Patrolman Martinez' illness was a 'reasonable period" within the meaning of Rule 5(c)(i)" (App. Ex. H, p. 5).

ARGUMENT

The District Court properly denied the motion to dismiss the indictment.

The sole issue on this appeal is whether Judge Duffy properly refused to dismiss the indictment on the ground that the Government had allegedly violated the District Court's Plan for Achieving Prompt Disposition of Criminal Cases ("the Plan"). Appellant has utterly failed to demonstrate that Judge Duffy's findings of fact with respect to the unavailability of police officer Martinez were clearly erroneous or that he applied an improper legal standard in rejecting the arguments advanced by the defense in support of the motion.

At the hearing below and on this appeal, it was and is the Government's position that Martinez was "unavailable" as a witness from July 20, 1973 until late January, 1974 because he was physically unable to testify during that period.* During that period, he sustained two serious head

* Accordingly, appellant is incorrect in maintaining that the Government argued at the hearing that it had no duty to inform the Court of the witness' availability. The statement made by Government counsel upon which appellant bases his argument was made in an entirely different context, namely, to explain why the motions for adjournment were not renewed at the expiration of each four week period.

injuries, one of which resulted in a cerebral concussion. These injuries resulted in temporary blackness of vision in his left eye during the period from July 20 until November 9 and frequent and unpredictable attacks of dizziness during that period and thereafter.

At no time during this period did Martinez engage in his usual assignment. Except for the period between August 7 and September 13 when he was assigned to light duty, Martinez remained at home on sick leave. Although he again returned to work for light duty on December 3, he continued to experience episodes of vertigo until January. Indeed, the police surgeon did not refer Martinez to a neurologist for the vertigo until December 18. Under these circumstances, Judge Duffy was clearly correct in finding that Martinez was unavailable to testify:

> "Both the government and the defendants are entitled to the testimony of [a] witness who is not likely to be seized by blackness of vision or dizzy spells on the witness stand" (App. Ex. H, p. 4).

Instead of measuring the witness' "unavailability" by the common sense standard which this Court has said applies, *United States* v. *Flores,* 501 F.2d 1356, 1360 (2d Cir. 1974); *United States* v. *Rollins,* 487 F.2d 409, 411 (2d Cir. 1973), appellant appears to argue that unless the witness is "confined to bed or . . . his home", he is available (Br. at 18). No interest properly protected by the Plan would be served by permitting appellant to engraft this parsimonious construction upon Rule 5(c)(i).

Sanchez argues that the witness was available to testify because he and his family moved their home from New York City to Monroe, New York during August, 1973. However, Martinez testified at the hearing that his brothers did all the work and that he rendered no assistance (H.

39-40).* The evidence relating to the move to Monroe is hardly a sufficient basis for a claim that Judge Duffy's finding as to Martinez' availability was clearly erroneous.

Nor is there merit to the argument that because Martinez could drive a car, he was therefore available to testify. With respect to the matter of driving, Martinez testified that nausea always preceded the episodes of dizziness so that if attack occurred while he was driving, he had advance warning and could pull over to the side of the road. While on sick leave, his driving was limited to getting to and from doctors' appointments and driving his wife (who could not drive) to do her shopping. Despite his ability to drive, the police surgeon continued Martinez on sick report. Martinez' ability to drive a car for limited periods of time is far from conclusive evidence that he was fully capable of withstanding the rigors of testifying as the Government's principal witness at a criminal trial without jeopardizing his own health, the Government's case or the rights of both defendants to a fair trial.** On this record, it cannot be said that Judge Duffy abused his discretion in finding the witness was unavailable during the period from August to December 3. *Cf. Bernstein* v. *Travia,* 495 F.2d 1180, 1182 (2d Cir. 1974).

Appellant also argues that his conviction should be reversed because the Government allegedly failed to exercise "due diligence to obtain" Martinez' appearance as required

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* Even if there were isolated days on which the witness did not suffer attacks of vertigo, the District Court was not required to "embark on an exact accounting of whether there was, at every moment beyond six months from the indictment, in fact and in effect a tolling of the six month rule." *United States* v. *Aprea,* 358 F. Supp. 1126, 1127 (S.D.N.Y. 1973) (Gurfein, *J.*). It is sufficient if the facts demonstrate that the delay was continuously justified.

** Martinez' testimony comprised 97 pages of 136 pages of testimony at the March, 1974 trial.

by Rule 5(c)(i). Appellant's "due diligence" argument is predicated on the assumption that since Martinez was able to perform "light duty" during the period from August 7 to September 13, when the second accident occurred, he was therefore able to appear and testify. According to appellant, the Government was under a duty to contact Martinez personally and report to the District Judge the fact (unknown to Government counsel) that he had returned to work. The failure to do so, appellant argues, constitutes a violation of Rule 5(c)(i). The argument is wholly without merit.

Martinez' return to work for limited duty did not alter the basic problem which caused the application for an adjournment, *i.e.*, the continuous and unpredictable episodes of vertigo. While these attacks might not have interfered with his answering telephones and filling out reports, there was a substantial likelihood, as Judge Duffy found, that they would have impaired his ability to testify at the trial. Accordingly, the failure of Government counsel to learn that Martinez had reported for light duty and to apprise the District Court thereof did not affect in any way his unavailability. See *United States* v. *Rollins*, 487 F.2d 409, 414 (2d Cir. 1973).

The Government fully complied with its duty call to the District Court's attention relevant circumstances known to it bearing upon the scheduling of the case for trial. *United States* v. *Cacciatore*, 487 F.2d 240, 243-44 (2d Cir. 1974); *United States* v. *Pierro*, 478 F.2d 386, 388 (2d Cir. 1973). Following the first accident on July 20, 1973, the Government moved ten days later for an adjournment. When the witness became available to testify in late January, 1974, this fact was reported to the District Court on January 22, 1974. Appellant has not pointed to any material fact in the record which, if known by the Government and more seasonably reported to the District Judge, would have accelerated the trial below.

Appellant's final argument for reversal of his conviction is that the Government should have advised the District Court that Martinez returned to work for light duty on December 3, and that the failure to report its readiness for trial until January 22, 1974 violated the Plan. There is no merit to the argument.

Though Martinez returned to work for light duty on December 3, the attacks of vertigo continued through December and into January. Until the symptoms abated, he was, in the Government's view, unavailable as a witness. Thus, even if the District Court's schedule would have permitted a trial in December or January, the witness' unavailability precluded a trial until late January, when the Government reported it was again prepared to try the case.

However, Judge Duffy ruled that he could not have scheduled the case between December 3, 1973 and March 21, 1974, when the case was set for trial, because that period was taken up with two previously scheduled trials. In *United States* v. *Atkins,* 503 F.2d 500, 501-02 (2d Cir. 1974), this Court ruled that delay resulting from a district judge's congested calendar is not the kind of unnecessary delay that the Plan was designed to avoid. Such delay is not grounds for dismissal of an indictment.

Appellant argues that Judge Duffy should have requested that the case be reassigned to another judge for trial (Br. at 28). The record indicates that he attempted to do so on or about January 22 (see App. Ex. G, p. 2), and Government counsel advised his clerk that the prosecution was ready to proceed the next day before Judge Bauman. The defense apparently was not, since the case was not tried until March 21 before Judge Duffy. On this appeal, appellant does not point to anything in the record which suggests that any other judge could have heard the case sooner than March 21. *Id.* at 502 n. 4.

Sanchez also contends that the District Court could have tried the case in December or January during periods when the *Perma* and *Tramunti* trials were adjourned. But there is nothing in the record to suggest that the District Judge during these brief periods was anything but busy with pressing matters related to these and other cases. In any event, Rule 9(a) of the Plan places on the District Court the "sole responsibility for setting and calling cases for trial." *United States* v. *Atkins, supra,* 503 F.2d at 501-02; *United States* v. *Cacciatore,* 487 F.2d 240, 243 (2d Cir. 1973). Furthermore, since appellant was free on bond throughout the pretrial period and thereafter and no prejudice is claimed, his complaint as to the District Court's scheduling of the case is without merit. *Cf. United States* v. *Pierro, supra,* 478 F.2d at 389.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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